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Opinion Below

The opinion of the Court of Appeals for the Tenth Circuit (App. A of petition) is reported at 419 F.2d. 465.

Jurisdiction

The Petition does not contain citations of statutes or any other authorities which would confer jurisdiction upon this court.

Questions Presented

The questions presented are adequately set forth in the petition.

Statutes Involved

Section 7-408.1 Wyoming Statutes 1957 (Cum. Supp. 1969).

> Any person imprisioned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the constitution of the United States or of the State of Wyoming, or both, may institute proceedings under this act (§ 7-408.1 to 7-408.8). The proceedings shall be commenced by filing with the clerk of the court in which the conviction took place a petition verified by affidavit, together with a copy thereof, which copy shall be forwarded by the clerk of court to the attorney general of the State of Wyoming by certified or registered mail. The Clerk shall docket the petition upon his receipt thereof and bring the same promptly to the attention of the court. No proceeding under this act shall be commenced more than five years after the conviction and sentence of the accused, unless the petitioner alleges facts showing that the delay was not due to his own neglect.

Statement of the Case

Respondent wishes to supplement that which the Petitioner has set forth in his petition.

The District Court held an evidentiary hearing when the Petition for Rehearing was argued on January 31, 1969, at the request of and for the convenience of the Petitioner. Counsel for the Petitioner was fully prepared for an evidentiary hearing and brought Mr. Eugene M. Brace, an investigator, from Denver to testify as the Transcript of Hearing page 6 et. seq. indicates.

The Court of Appeals for the Tenth Circuit (App. A of Petition) affirmed the judgment of the District Court (App.B of Petition p. 43).

Reasons for Denying the Writ

This case is not of such importance as to require review by the United States Supreme Court.

A decision in this case by the United States Supreme Court would effect very few persons other than the litigants in the present case. This case revolves on its own facts.

The holding by the lower court is not in conflict with any other Court of Appeals or United States Supreme Court holding.

The question of innocence or guilt does not involve a federal question but is a matter for the state court.

Decision of Lower Court Correct

Respondent would like to clarify some of the abbreviations used in its brief as follows:

T.T. means Trial Transcript of the Original trial held in Sweetwater County, Wyoming in Criminal Case No. 2832 beginning September 24, 1962.

Rehearing T. 1969 means the hearing on the petition for a rehearing before the United States District Court for the District of Wyoming held January 31, 1969.

I. WAS PETITIONER'S REPRESENTATION BY TRIAL COUNSEL SO LACKING IN THOSE FUNDAMENTAL PRECEPTS OF JUSTICE AS TO AMOUNT TO A DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL AND OF DUE PROCESS OF LAW?

A. *Applicable Case Law*

Petitioner's brief states that counsel's representation must be such as to make a trial a mockery, a sham or a farce in order to validate a claim of incompetent counsel. With this rule of law we agree. Petitioner cites authorities for this rule which Respondent adopts without restating the authorities and in addition thereto, cites *Relford v. the Commandant, U.S. Disciplinary Barracks,* 409 F2d 824 (10th Cir. 1969) and *Garrison v. Patterson* 405 F2d 696 (10th Cir. 1969) as authorities on this issue.

Petitioner cites *Chapman v. California,* 386 U.S. 18, which held that a new trial is warranted when there is constitutional error unless the Court can state "beyond a reasonable doubt" that no prejudice resulted. However, in *Harrington v. California,* 395 U.S. 250, 254, the Court said;

> "Their evidence, supplied through their confessions was of course cummulative. But apart from them the case against Harrington was so overwhelming that we conclude that this violation of Bruton was harmless beyond a reasonable doubt, unless we adopt the minority view in Chapman (386 U.S. 42-45) that a departure from constitutional procedure should result in an automatic reversal, no matter the weight of the evidence."

Although *Bruton v. United States,* 391 U.S. 123, held that a confession of the co-defendant who did not take the stand could not be introduced as evidence without violating the

defendant's constitutional rights, in the Harrington case the confessions of Harrington's co-defendants were introduced in evidence although the co-defendants did not testify. However, the court held this to be harmless error because the defendant would have been convicted without the confessions being in evidence.

B. *Performance of Trial Counsel*

In the present case the evidence against Opie was so overwhelming in view of his admissions and statements before and after his wife's death that even if his trial counsel did not present every shred of evidence he possibly could have presented, any error should be deemed harmless.

At the top of Page 9 of the petition it is claimed that: "At no time did trial counsel attempt to present evidence, expert or otherwise, relating to these crucial issues" which is in reference to the gun's trigger pull. This statement is simply not true. Opie testified at great length at the original trial when his counsel, Mr. Marty, examined him as to what he had done to the gun's trigger. Opie explained that by heating the spring the gun was easier to cock and had a hair trigger which would go off twice as fast as a normal gun. (T.T. 310, 311).

At the top of Page 6 of his petition, Opie claims the State's theory of first degree murder was necessarily predicated upon allegations that (a) the murder weapon was discharged at a distance not less than 18 inches, (b) the deceased did not have her hands on the gun at the timeof discharge, and (c) the death weapon was in a safe condition and possessed a normal trigger pull.

Such contentions are not true. Many other issues were involved and considered by the jury in the trial of this case.

Opie testified at the original trial that he was standing on the deceased's left-hand side of the chair and that he was positive of this (T.T. pp. 364, 365 and 374). He further stated that he was never on the right side (T.T. p. 375).

Opie further testified that he first grabbed the gun with his right hand (T.T. p. 337) and then with his other hand behind his right hand. (T.T. 368).

He further clarified how he grabbed the gun by testifying that he grabbed the gun around the chamber (T.T. p. 362) with his right hand (T.T. p. 363).

At the hearing on the Motion to Dismiss in the Federal District Court for the District of Wyoming held on January 31, 1969, Eugene Brace, a private investigator from Denver, Colorado, testified at length as to how Mrs. Opie was supposedly killed (Rehearing T. 1969 pp. 7-111). Mr. Brace was called by Mr. Opie as an expert witness.

Mr. Brace testified that the presence of blood stains on the front and rear portions of the left leg and the fact that there was no blood on the right leg of Opie's pants or on any other area of his jeans indicated that the defendent had to be at a right angle to the point from where the blood originated, which was the face of the deceased. (Rehearing T. 1969, p. 25). He further stated that "defendant was faced to the right of the deceased so that all of the blood was received on the left front and left rear portion of the jeans." (Rehearing T. p. 25). At the original trial Opie denied he was on the right hand side (T.T. pp. 364, 374). During the trial he went into detail as to what he was doing and where he was standing before he grabbed the gun. (T.T. pp. 236, 237).

A simple re-enactment of Mr. Brace's theory that Opie was on the right-hand side of the chair discredits the theory.

If Mr. Opie was standing on the right-hand side of the deceased and grabbed the gun with his right hand so that his thumb was on the left-hand side of the gun, as stated by Mr. Brace, (Rehearing T. 1969, p. 23) and Opie's left leg and body was at a right angle to the deceased's face then Opie would have had to cross his arms by putting his left hand over his right arm in order to grab the gun behind his right hand. At the original trial Opie testified that he grabbed the gun first with his right

hand and then with his left hand behind the right hand (T.T. p. 338).

However, Mr. Brace testified that Opie did not grab the gun with his left hand but instead leaned against the wall with his left hand (Rehearing T. p. 68). This theory is not factual for two reasons. First, there was no wall for Opie to lean against as the pictures so indicate and which are a part of the record. Second, if Opie was actually trying to take the gun away he would have used both hands instead of leisurely grabbing the gun with one hand and leaning against the wall with the other. He would have grabbed the gun and wrestled it from her in a split second.

Opie testified that the deceased had hold of the gun by the grip (T.T. p. 365) so by grabbing the front of the gun around the chamber he had much more leverage and could have twisted it right out of her hand.

The combination of Opie's testimony at the original trial and Mr. Brace's testimony at the rehearing in January 1969, proves that it would have also been impossible for Opie to have been on the left-hand side of the deceased and to have grabbed the gun.

As pointed out above, Mr. Brace said that Opie had to be at a right angle to Mrs. Opie's face with his left leg and body in order to get blood on the front and rear of his trouser leg. Therefore, if one would re-enact this segment of the crime and take such a position, Opie would have had to have reached all the way across his body with his right hand in order to reach the gun. This he could not have done while standing at a right angle. Mr. Brace acknowledged this fact in the re-enactment of the crime at the 1969 rehearing (Rehearing T. 1969, p. 71).

Mr. Brace was positive that Opie was on the right-hand side of the chair for the reason that Opie did not get blood on his trousers below the knee. In Brace's opinion, the arm of the chair intercepted the blood (Rehearing T. 1969, p. 72). A little later Mr. Brace admitted that he was in error in claiming there

was blood on the right-hand arm of the chair (Rehearing T. 1969, pp. 76, 82). The only reason he admitted this error was the fact that his testimony at the motion for a new trial in Sweetwater County, Criminal Case 2832, was that there was an "absence of any blood drops or blood spatterings on the right-hand arm of the chair or the books thereon." (Rehearing T. 1969, pp. 75, 76).

So Mr. Brace, an experienced investigator and an expert at homicide investigation, was unable to keep his theories straight as to what had happened and the reasons for the same.

Mr. Brace also stated that he was not qualified to state how far blood would spatter when someone is shot. (Rehearing T. 1969, p. 87). However, he insisted that in his opinion Opie was standing within ten inches of the deceased when the wound was inflicted. (Rehearing T. 1969, p. 94).

After testifying as to the importance of blood being on the right-hand side of the chair, and, even after admitting there was no blood on the right-hand side of the chair, Mr. Brace stated that the fact there was blood on the left-hand side of the chair was of no significance. (Rehearing T. 1969, p. 109). It appears that what Mr. Brace has attempted to do is take the evidence which would be favorable to Opie and then ignore the same kind of evidence when unfavorable.

The court below pointed out in its decision that dissatisfaction with the performance of one's counsel does not constitute ineffective assistance of counsel.

The court also said:

> "Counsel for Opie on this appeal readily concedes that the trial was not a mockery, a sham or a farce but asserts that the offered evidence would at least create a reasonable doubt in the minds of the jury. This is rank speculation, particularly in view of the state trial record which overwhelmingly points to the guilt of the accused." Opie v. Meacham 419 F2d, 467.

C. *Admissions and Statements*

Shortly before Opie was arrested he made the following statement to the police.

> " 'I shot her, I loved her and I should go to the gas chamber.' " (T.T. p. 183).

Howard Overy testified that he talked to Opie the night Mrs. Opie was killed and Opie asked him how he felt about breaking up with his wife. Opie also asked him if he was ever mad enough to kill his ex-wife and that he, Opie, would like to try his gun on something (T.T. p. 202). Howard Overy testified that Opie told him he was going to kill someone that night (T.T. p. 203). Mr. Overy further stated that Opie asked him if he had ever killed anyone. When Overy answered "No" Opie said that he was going to kill someone before the night was over (T.T. p. 205).

Henry A. Wilkes testified that Opie had told him, prior to the death of his wife, that someone had seen Mr. Wilkes down at Opie's apartment (T.T. p. 218). Wilkes also testified that Opie had come to his home and threatened to kick his head in (T.T. p. 214).

Howard Humphreys, son of Iris Opie, the deceased, testified that he was home in bed that night and woke up and heard Opie ask Mrs. Opie "if he should pull the trigger now?" and his mother replied " 'Go ahead' ". (T.T. p. 222). Howard Humphreys further testified that after a while he heard the lever go back and that he then fell asleep. (T.T. p. 22).

Gilbert W. Fletcher, a Rock Springs police officer, testified that after Opie was returned to the apartment following the killing that Opie started going toward the deceased and someone told him not to touch her (T.T. p. 64). Fletcher stated that he then grabbed Opie by the arm and told him to sit down and take it easy, and Opie replied that where he was going he would'nt have to relax. (T.T. p. 65).

Petitioner takes issue with the fact that Respondent's Stipulation (App. B of petition p. 51) for exhumation of the body stated that Respondent had no objection to Petitioner exhuming the body but did not thereby waive prior argument that the distance the gun was from the deceased's head was not relevant. Respondent felt no duty to argue Petitioner's case for the exhumation after the rehearing. If trial counsel should have presented evidence as to the distance of the gun from the deceased when fired, as Petitioner now claims, it would have been necessary for trial counsel to exhume the body and present the best evidence.

After the evidence and testimony of all of the proceedings that have transpired in this case are examined, it would appear that Opie's trial counsel did a remarkable job in saving Opie from the death penalty. Statements made by Opie prior to and after the death of his wife are most incriminating as well as the testimony of Mrs. Opie's little boy, Howard Humphreys.

At the trial, as pointed out earlier, Opie said he was standing on the left side of Mrs. Opie. Of course, now, the investigator, Mr. Brace, has stated that Opie was on the right-hand side. However, Mr. Marty was stuck with the testimony of Opie at the trial and with what Opie had told him prior to the trial. If Mr. Marty would have pursued the theories now suggested by Opie, the prosecution certainly would have pointed out all of the faults of these theories. The result most likely would have been the death penalty. This is because the additional evidence which has been brought out in the course of the many hearings proves beyond any reasonable doubt that Opie was guilty.

The theories advanced by Opie are not believable. By not pursuing the distance of the gun from the deceased's head when fired and the position of Opie when the fatal shot was fired, trial counsel was able to conceal some of the brutality of the slaying.

Opie's trial counsel did not have the benefit of a trial transcript from a prior trial of the case. Trial counsel tried the case for the first time. It is not difficult to read a trial transcript and second guess and speculate as to what may have happened if certain things would have been done differently.

D. *Personnally Selected Counsel*

In the Order Sustaining Motion to Dismiss dated December 4, 1968, (App. B. of petition p. 43).

> "17. Petitioner has made no charge that his counsel were not ordinarily competent or that they lacked good faith in their trial or procedural tactics. There are no allegations showing that petitioner's counsel were so incompetent that they made a farce of his trial such as to require the court to intervene in behalf of the accused, the petitioner herein. There is no substance in petitioner's contention that any of his counsel were inefficient in their representation of petitioner.
>
> "18. The state is responsible under the due process requirement contained in the Fourteenth Amendment to protect and accused's right to have the effective assistance of competent counsel. Where, as here, however, petitioner retained counsel of his own choice to represent him, he cannot successfully claim that the state denied him the right to have effective assistance of counsel. It is only the denial of that right that would have put petitioner in the position to challenge a judgment of conviction by writ of habeas corpus. Hudspeth, Warden v. McDonald, 10th Cir., 120 F2d 962, 968 (1941), Cert. Den. 314 U.S. 617." (Appendix Appellant's Brief pp. 40, 41).

In the Order Denying Petition for Rehearing dated March 28, 1969, (App. B of Petition P. 49), the Court found as follows:

" 1. By order filed on December 4, 1968, sustaining the respondent's motion to dismiss, this court found, inter alia, that at all times material herein, petitioner had been represented by his personally selected and personally retained counsel; that the effectiveness of petitioner's personally selected and retained counsel is his sole responsibility; that petitioner has no grounds to claim that the state denied him the right to have adequate assistance of counsel; and that the alleged inadequacy of petitioner's personally selected and retained counsel is not a proper ground on which to issue a writ of habeas corpus." (Appendix Appellant's Brief, p. 42).

Since Opie personally selected his counsel he cannot be heard now to complain that he was ineffective.

Deliberate Bypass

If an applicant for a writ of habeas corpus deliberately bypasses State procedures the Federal Court may deny him relief. *Fay v. Noia*, 372, U.S. 391, 9 L.Ed 2d 837, 83 S.Ct. 822.

The Court of Appeals for the 10th Circuit has held that a petitioner may be barred from relief in the Federal Courts when State remedies are forfeited because petitioner deliberately bypassed state remedies. *Kinnell v. Crouse*, 384, F.2d 811 (10 Cir.) Cert. Denied 390 U.S. 999, *Landgon v. Patterson* 376 F2d 29 (10th Cir), *Terry v. Patterson*, 372 F.2d 480. (10th Cir.).

When the Petition for a Writ of Habeas Corpus filed January 14, 1965, in the Unites States District Court for the District of Wyoming was dismissed by an Order of the Court (App. A of Respondents brief) on April 26, 1965, the Court stated that the petition was dismissed without prejudice because petitioner had not exhausted his State remedies and the appellant could renew the same after the issues were fully and finally litigated in State courts. Instead of presenting the issue to the State Court as ordered in the Order of Dismissal, Petitioner let the five year period of limitations for proceeding

under the Post Conviction Act of the State of Wyoming, Section 7-408.1, Wyoming Statutes 1957, as amended, lapse. Then on June 19, 1968, Petitioner filed another Petition for a Writ of Habeas Corpus in the United States District Court for the District of Wyoming and raised the same issue he had raised in his prior petition. Opie claimed "Petitioner was denied effective assistance of counsel whose representation was so lacking in those fundamental precepts of justice as to amount to a denial of due process." (Order Sustaining Motion to Dismiss, App. B of Petition p. 43).

The court held in its Order of December 4, 1968 that the delay in not instituting proceedings under the Post Conviction Act was not caused by Petitioner's neglect and, therefore, by such showing Petitioner could still present the issue of ineffective assistance of counsel to the State Court.

Instead of then going back to the State Court to resolve the issue, Petitioner filed a Motion for Rehearing. In denying the Petition for Rehearing the Court Stated: ". . . Petitioner and his personally selected and retained counsel had not commenced proceedings under the Post Conviction Act of the State of Wyoming. Petitioner has not alleged facts showing that such delay subsequent to December 4, 1968 was not due to his own neglect; and the record clearly shows that the Petitioner has failed to exhaust his available State remedy and that he has willfully and deliberately bypassed the State's post conviction remedies available to him." (App. B. of petition p. 49).

Since the question, as to whether Petitioner's failure to present the matter of ineffective assistance of counsel was due to Petitioner's own neglect, had not been presented to the State Court, the United States District Court was interpreting the statute as it believed the State Court would interpret it. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L.ED. 1188. In effect we have the same result as if Petitioner had gone to the state court and shown to the satisfaction of the court that the delay in not

filing under the post conviction statute was not due to his own neglect. He could not ignore a favorable state ruling and file a petition in Federal Court. The United States District Court held that Petitioner could not bypass the State Court and again file a petition for writ of habeas corpus in the United States District Court and escape the "deliberate bypass rule" when it held he had a remedy in State Court.

If a court should dismiss for want of exhaustion of State remedies and then grant a rehearing, the court would not gain jurisdiction by such an act. Nor did the court gain jurisdiction by granting a hearing on Petitioner's Motion for Rehearing in the present case.

However, Opie was not granted a rehearing on the Petition for Writ of Habeas Corpus which was dismissed by the Court's Order dated December 4, 1968. The hearing on January 31, 1969 was on the Petition for Rehearing, which the Court denied by its Order Denying Petition for Rehearing dated March 28, 1969. (App. B of petition p. 49).

So Opie's statement that the Petition for Rehearing was granted, at Page 14 of his petition, is not true. Therefore the statement at Page 14 of the petition that the full hearing on January 31, 1969 was "an affirmace of Federal jurisdiction" falls flat.

III. IS THE PETITIONER INNOCENT OF THE CRIME FOR WHICH HE STANDS CONVICTED?

The court below stated that the state trial record overwhelmingly pointed to the guilt of the accused.

The court also stated:

> "Furthermore, the guilt or innocence of an accused person when determined by a state court is not subject to review by federal courts in habeas corpus proceedings. A state prisoner is entitled to relief in federal courts only when rights guaranteed by the United States Constitution have been denied him. Wagenknecht v. Crouse, 10 Cir., 344 F.2d 920 (1965)." Opie v. Meacham, 419 F.2d 465.

There is no reason why the court should even consider Petitioner's contention of innocence. The court below termed Petitioner's allegation that offered evidence would have created a reasonable doubt in the minds of the jury rank speculation.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiarari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING.

No. 4874 Civil
JEREMIAH OPIE, also known as
JERRY OPIE,
PETITIONER,

v.

LENARD F. MEACHAM, Warden of the
Wyoming State Penitentiary,
RESPONDENT.

ORDER DISMISSING A PETITION
FOR WRIT OF HABEAS CORPUS

Upon the request of the petitioner, Jeremiah Warden Opie, to withdraw the above entitled action from this court, and the Court being fully advised in the premises, it is

ORDERED that said petition be, and the same is hereby, dismissed without prejudice to the right to renew the petition after the matter is fully and finally litigated in the state court.

Dated this 26 day of April, 1965.

/S/ EWING T. KERR
Judge.